

Claimant alleges accidental injury on June 15, 1999, when he fell through an open grating in the floor of the Wal-Mart Store automotive department, breaking his left leg. The only dispute centers around whether claimant fell through the floor accidentally or whether claimant jumped through the floor while in a race with a co-employee, Michael Clutter. Both claimant and Mr. Clutter have denied that the alleged racing incident occurred, although Mr. Clutter does acknowledge that claimant made a comment several minutes before the injury actually occurred that he could beat him into the pit. However, other witnesses, specifically Lee Brock Moody, Wal-Mart's loss prevention officer, and Maggie

DuPont, the department manager of Tire and Lube Express, both testified to hearing Mr. Clutter describe the incident as a race rather than an accident.

The Administrative Law Judge observed the live testimony of claimant, Mr. Clutter, Mr. Moody and Ms. DuPont. The Appeals Board generally gives some deference to an administrative law judge who has the opportunity to observe live testimony. This provides the administrative law judge the opportunity to assess the credibility of the various witnesses. In this instance, the Administrative Law Judge found that claimant's and Mr. Clutter's testimonies were the more credible. In reviewing the overall evidence, the Appeals Board agrees. While Mr. Clutter does acknowledge the comment regarding the race was made, he also testified that claimant's fall actually occurred between two and five minutes after the comment was made. He denies being involved in any race with claimant into the pit area. He describes the incident involving claimant's fall as accidental. In addition, claimant denies being involved in any type of race but instead fell into the pit while walking across the floor.

This finding, while binding upon the parties at this time, is not binding in a full hearing on the claim and shall be subject to a full presentation of the facts at a later date.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Julie A. N. Sample dated July 22, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1999.

BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
H. Wayne Powers, Overland Park, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director